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Wochnick, Heather M CIV USN (US)

From: Carr.Robert@epamail.epa.gov
Sent: Tuesday, October 12, 2010 8:44
To: Callaway, Rex CIV NAVFAC SW
Cc: Robert Elliott
Subject: Re: EPA Comments on Draft FFA Amendments
Attachments: HPS.FFA Amendment#1.8 RLE 10-11-10.doc

There are a few issues we need to discuss regarding the FFA A Some are still in the conceptual stage, some are reflected in proposed language:

Navy Obligations: Modify definition to make it clear that the exception applies only to the implementation of the additional action not the evaluation, selection, etc.

i. Evaluating the need for amendments to and Explanations of Significant Differences (ESDs) from the Parcel B and G RODs, preparing and issuing such documents, and conducting any additional remedial action required by such documents except for the obligation to conduct such actions to the extent the need for such action is attributable to any of the following:

Emergency: We need to be sure that the ETCA AOC and FFAA have consistent language regarding obligations to address emergency situations, but I expect that the ETCA is where that discussion needs to start.

Additional Work: If a Navy Retained Condition is encountered it may be most effective to have the work conducted by the Respondent. The documents need to provide for that possibility and for appropriate oversight.

Disputes regarding NRC: If we agree that the AOC DR process should be used, the language regarding the reservation of rights in the FFA should cover both parties under the ETCA.

Transitioning from the AOC to an O & M Agreement: If we decide to use this approach, the suspension of Navy obligations will need to be conditioned on Respondents' compliance with the Agreement.

WHEREAS, SFRA will perform work pursuant to the ETCA and the AOC, or a related O & M Agreement, certain Navy obligations under the 1992 FFA as to the Early Transfer Property should be suspended, revised, or otherwise changed as set forth in this Amendment; and

The Navy's suspended FFA obligations shall resume upon the Navy's receipt of a Finding of Default, or upon the failure of Respondents to comply with the requirements of the O & M Agreement provided that the Navy shall be given written notice of Respondents' failure and shall have a reasonable opportunity to cure such failure or cause Respondents to cure such failure.

See attached version which has Bob E's comments inserted into the document.

Robert Carr
415 972 3913
FAX 415 947 3570/71

**Navy Draft
HPS.FFA Amendment#1.8.doc
Navy Draft, 3 Sept 10**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
AND THE
STATE OF CALIFORNIA
AND THE
DEPARTMENT OF THE NAVY

IN THE MATTER OF:)	
)	
U. S.)	
Department of the Navy)	FEDERAL FACILITY AGREEMENT
Naval Station)	CERCLA Section 120
Treasure Island -Hunters)	
Point Annex)	AMENDMENT NO. 1 RELATED TO
		EARLY TRANSFER PROPERTY
		REFERENCED IN FOSET 1

WHEREAS, on January 22, 1992, the Environmental Protection Agency (“EPA”), State of California Department of Toxic Substances Control (“DTSC”), San Francisco Regional Water Quality Control Board (“RWQCB”), and the Department of the Navy (“Navy”) entered into a Federal Facility Agreement (“the 1992 FFA”) requiring the Navy to identify, perform and complete all necessary response actions at the former Naval Station Treasure Island –Hunters Point Annex (“Hunters Point Naval Shipyard” or “HPS”) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”); and

WHEREAS, the Federal Government, for and on behalf of the citizens of the United States of America, acts as the steward of certain real property on which it operates and maintains military facilities necessary for the defense of the United States of America. Certain military facilities are no longer required for that mission, and, in accordance with various base closure statutory authorities, the Department of Defense (“DOD”) closed and plans to dispose of real and personal property at those facilities; and.

WHEREAS, the former ~~Hunter's Point Naval Shipyard~~ HPS was selected in 1991 for Base Realignment and Closure; and

WHEREAS, the Navy is authorized to dispose of real and personal property on ~~Hunters Point Naval Shipyard~~ ("HPS"), to the City of San Francisco or to a local reuse organization approved by the City, in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended by Section 2834 of the National Defense Authorization Action Act for Fiscal Year 1994 (Public Law 103- 160). The San Francisco Redevelopment Agency ("SFRA") is a local reuse organization approved by the City of San Francisco to accept conveyance of HPS property in accordance with the authorities set out above; and

WHEREAS, the Navy and SFRA did execute and enter into that certain *Conveyance Agreement Between the United States of America, Acting by and through the Secretary of the Navy, and the San Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard*, dated March 31, 2004 ("Conveyance Agreement"); and

WHEREAS, the ~~City of San Francisco Redevelopment Agency~~ ("SFRA") has requested an early transfer of HPS Parcel B, with the exception of IR Sites 7 and 18 and the radiologically-impacted area around Building 140, and HPNS Parcel G- as described in the Finding of Suitability for Early Transfer, Former Hunters Point Shipyard, California ("FOSET") 1 within the Hunters Point Shipyard Superfund Site, which will be referred to as the "Early Transfer Property"; and

WHEREAS, the Navy and SFRA have entered into an Early Transfer Cooperative Agreement ("ETCA") as a vehicle for the Navy to fund SFRA to complete any CERCLA response actions and to perform associated Long Term Obligations on the Early Transfer Property necessary to protect human health and the environment and to facilitate reuse and to commence with redevelopment; and

WHEREAS, EPA Region IX, DTSC and RWQCB have entered into an Administrative Order on Consent ("AOC") with SFRA and HPS Development Co., LP ("AOC respondents") which provides for the completion by the AOC respondents of CERCLA response actions and performance by the AOC respondents of associated Long Term Obligations on the Early Transfer Property for the protection of human health and the environment; and

WHEREAS, the Navy has prepared a Covenant Deferral Request requesting that the Representative of the EPA Administrator approve the Early Transfer, with the concurrence of the Governor of California, in accordance with CERCLA Section 120(h)(3)(C)(i)(I)-(IV) inclusive, which will demonstrate that the Early Transfer Property is suitable for transfer prior to the completion of all necessary response actions and for the

reuse intended by the transferee; and

WHEREAS, the proposed CERCLA covenant deferral on the Early Transfer Property will be based upon land use restrictions to be included in the federal deed and the state covenant to restrict use of property ("CRUP"); and

WHEREAS, SFRA will perform work pursuant to the ETCA and the AOC, certain Navy obligations under the 1992 FFA as to the Early Transfer Property should be suspended, revised, or otherwise changed as set forth in this Amendment; and

THEREFORE, based on the information available to the undersigned Parties on the effective date of this Amendment to the 1992 FFA, and without trial or adjudication of any issues of fact or law, and in accordance with Section 29 ("AMENDMENT OR MODIFICATION OF AGREEMENT") of the 1992 FFA, the Parties agree to amend the 1992 FFA, as provided below. All terms and conditions of the 1992 FFA remain in effect and in full force regarding all property within the Hunters Point Shipyard Superfund Site, including the Early Transfer Property, unless expressly suspended or revised in this Amendment.

I. Section 3 (DEFINITIONS) of the 1992 FFA is amended to add Section 3.2 consisting of the following definitions:

- A. "1992 FFA" shall mean the Federal Facility Agreement and all Appendices incorporated into the Agreement for Hunters Point Shipyard that became effective on January 22, 1992, between EPA, the Navy, DTSC, and RWQCB; and
- B. "Administrative Order on Consent" or "AOC" shall mean the Administrative Order on Consent (CERCLA Docket No. xxxx) between EPA, DTSC, and the RWQCB and the AOC respondents that provides for the completion by the AOC respondents of response actions and associated Long Term Obligations required by the Parcel B and G RODs on the Early Transfer Property for the protection of human health and the environment; and
- C. "Amendment No. 1 to the 1992 FFA" or "Amendment", or "FFA Amendment" shall mean this document which supplements and, in relation to the Early Transfer Property only, revises the 1992 FFA, between EPA, the Navy, DTSC, and RWQCB.
- D. "Completion of Remedial Action" shall mean the point in time when the AOC respondents have performed all necessary CERCLA response actions, including establishment of all required Institutional Controls, on a given site or parcel of property, except for Long Term Obligations, and EPA has issued a Certificate of

Commented [rc1]: Note to EPA/DTSC: This definition will be revised to conform to the final definitions in the ETCA and AOC

Completion of Remedial Action pursuant to Section (xx) of the AOC.

- E. "DTSC" shall mean the California Department of Toxic Substances Control,.
- F. "Early Transfer Property" shall mean HPS Parcel B, with the exception of IR Sites 7 and 18 and the radiologically-impacted area around Building 140, and HPNS Parcel G described in the FOSET, and Early Transfer Cooperative Agreement ("ETCA") and depicted in Exhibit 1.
- G. "ETCA" shall mean the Early Transfer Cooperative Agreement, effective xxxx, entered into by the Navy and FFSRA pursuant to title 32, Code of Federal Regulations, Parts 21 through 33 (32 CFR Parts 21 through 33)..
- H. "Institutional Controls" shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination (including but not limited to MEC) and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.
- I. "Land Use Control Remedial Design" ("LUC RD") shall mean the LUC RD report(s) prepared as part of CERCLA Remedial Design documentation to refine institutional controls and specify procedures and responsibilities for their implementation.
- J. "Long Term **Obligations**" shall mean any requirement of a ROD or the AOC that extends beyond the Completion of Remedial Action, including but not limited to, long-term review and monitoring; implementation and enforcement of Land Use Controls; and other operation and maintenance activities, reporting, and performance of additional response actions, if needed.
- K. "Navy Retained Conditions" means Unexploded Ordnance ; Military Munitions; chemical, radiological, or biological warfare agents; and Radiological **Materials**.
- L. "Navy **Obligations**" means:
 - i. The performance of CERCLA five-year reviews for years 2013 and 2018 for remedies selected in the Parcel B and G RODs; and
 - ii. Evaluating the need for amendments to and Explanations of Significant Differences (ESDs) from the Parcel B and G RODs, preparing and issuing such documents, and conducting any additional remedial action required by such documents except to the extent attributable to any of the following:

Commented [rc2]: Note to EPA/DTSC: This definition will be revised to conform to the final definition in the ETCA/TSRS

Commented [rc3]: Note to EPA/DTSC: This definition will be revised to conform to the final definition in the ETCA/TSRS

1. the negligence of the SFRA or any party acting on its behalf, including but not limited to noncompliance with or failure to adequately enforce approved CERCLA institutional control and use restrictions.
2. requests by the SFRA or other party acting on behalf of the SFRA for modification of the remedies selected in the Parcels B and G RODs that are not required as a result of a Navy Remedy Failure, or Navy Retained Condition, and.
3. unknown conditions discovered during the course of remediation.

L.M. "Property Transfer" shall mean the transfer of the Early Transfer Property by deed from the Navy to SFRA.

M.N. "Radiological Materials" shall mean solid, liquid, or gaseous material derived from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides defined as being derived from the Navy's work on the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products commonly used in non-military applications such as radioluminescent signs, and household smoke detector components.

N.O. "Records of Decision" ('ROD(s)') for Parcels B and G" shall mean that certain CERCLA Amended Record of Decision for Parcel B dated January 14, 2009, and that certain CERCLA Record of Decision for Parcel G dated February 18, 2009, including all attachments thereto.

O.P. "RWQCB" shall mean the Regional Water Quality Control Board, San Francisco Bay Region, and any successor agencies of the State.

P.Q. "SFRA" shall mean the San Francisco Redevelopment Agency, a public body, corporate and politic, organized and existing under the Community Redevelopment Law of the State of California and a local reuse organization approved by the City of San Francisco to accept conveyance of HPS property in accordance with Section 2824(a) of Public Law 101-510 as amended.

Q.R. "State" shall mean the State of California.

R.S. "United States" shall mean the United States of America.

Commented [rc4]: Note to EPA/DTSC: The language in (ii) was added to address the EPA/DTSC concern re Navy responsibility for ROD Amendments and ESDs set forth in their comment on Section 6 5 1

Commented [RLE5]: Do we need a qualifier here in regard to ultimate responsibility if the AOC parties default or do you think it is adequately covered in section 6 5 3 and 11 7?

Commented [rc6]: Note to EPA/DTSC: This definition will be revised to conform to the final definition in the ETCA

II. The following obligations and rights of the Navy in respect to the Early Transfer Property shall be suspended or otherwise changed as provided in this Amendment: Section 6 (“WORK TO BE PERFORMED”), Section 7 (CONSULTATION), Section 8 (DEADLINES), Section 9 (EXTENSIONS), Section 11 (EMERGENCIES AND REMOVALS), Section 12 (DISPUTE RESOLUTION), Section 31 (COVENANT NOT TO SUE AND RESERVATION OF RIGHTS), Section 36 (EFFECTIVE DATE AND PUBLIC COMMENT), provided however, that none of these Sections shall be suspended with respect to any Navy Retained Conditions on the Early Transfer Property or other parcels of the former Hunters Point Shipyard installation.

III. Section 6 (WORK TO BE PERFORMED) of the 1992 FFA is amended to add the following sections as follows:

6.5 ASSUMPTION OF WORK ON EARLY TRANSFER PROPERTY BY AOC RESPONDENTS

6.5.1 Under the terms of the ETCA, the Navy has agreed to provide funds to SFRA in exchange for SFRA’s agreement to assume the Navy’s responsibilities to complete CERCLA response actions on the Early Transfer Property and to perform associated Long Term Obligations. In furtherance of the agreements reached between the Navy and SFRA in the ETCA and the AOC respondents’ commitments contained in the AOC, EPA, DTSC, and RWQCB agree that the AOC respondents assume ~~full~~ responsibility for completion of remedial action and associated Long Term Obligations required by the Parcels B and G RODs and associated Remedial Design reports pursuant to the ETCA and AOC. ~~The Navy shall remain responsible under the FFA for – implementing evaluating the need for amendments and Explanations of Significant Differences (ESDs) for the Parcel B and G RODs, as well as preparing such documents and implementing any additional work.~~

6.5.2. The Navy agrees that it will conduct necessary response actions and associated Long Term Obligations addressing Navy Retained Conditions and Navy Obligations. The Navy will notify EPA, DTSC, and RWQCB upon receipt of a claim by SFRA that an environmental condition that it has encountered is a Navy Retained Condition. In the event that there is a dispute between SFRA and the Navy ~~under the ETCA~~ concerning whether a particular environmental condition is an SFRA responsibility or a Navy Retained Condition, the dispute shall be resolved in accordance with the Dispute Resolution provisions of the AOC for purposes of defining Navy obligations under the FFA. If EPA determines that the condition is a Navy Retained Condition, the Navy shall, within 45 calendar days of the receipt

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Commented [rc7]: Note to EPA/DTSC: The Navy proposes to address the ROD Amendment/ESD issue in the definition of “Navy Obligations” rather than in this paragraph See above

Commented [rc8]: Note to EPA/DTSC: Bob Elliott made the following comment on this section of text: “Is there or should there be a provision for dealing with issues that may need to be completed in a timelier manner due to potential health risks” The Navy addresses this concern in its proposed revisions to Section 11 of the FFA (see Paragraph V of these amendments

of the final EPA determination submit a schedule to EPA, DTSC, and RWQCB for the required action pursuant to the 1992 FFA, or authorize SFRA to conduct such work under the AOC schedule. Nothing herein shall be construed to affect or impair the Navy's rights to pursue dispute resolution concerning whether certain work or environmental conditions are within the scope of the SFRA's obligations pursuant to Section 1001 of the ETCA and 32 CFR Section 22.815. Nothing herein shall be construed to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. Section 1341).

Commented [RLE9]: I have no problem with the Navy retaining any contract rights it may have with SFRA under the ETCA as long as it is clear that the SFRA has the same rights. Therefore, maybe this language should be expanded to encompass SFRA.

Commented [rc10]: Note to EPA/DTSC: This addition of this sentence will adequately address the Navy's concern about overlapping dispute resolution procedures in the ETCA, AOC, and FFA Amendments because it reserves the Navy's rights to pursue dispute resolution under the ETCA regarding the contractual scope of the work to be performed under the ETCA.

- 6.5.3. The Navy acknowledges its ultimate liability under CERCLA to complete all necessary response actions at the Early Transfer Property, in accordance with CERCLA. The parties acknowledge that the AOC respondents shall perform response actions for the cleanup of the Early Transfer Property pursuant to the ETCA and the AOC.

- 6.5.4. The Navy's FFA obligations suspended under Section II of this Amendment shall resume for HPS Parcel B, with the exception of IR Sites 7 and 18 and the radiologically-impacted area around Building 140, and HPNS Parcel G upon the date of ETCA termination if prior to the end of the ETCA term.

- 6.5.5. EPA, in consultation with DTSC, and RWQCB, shall take appropriate actions pursuant to the terms of the AOC, which may include assessing stipulated penalties, to enforce the AOC against the Respondent(s) prior to issuing a Notice of Intent to Find Default under the AOC relating to a particular parcel or site. EPA, DTSC, and RWQCB shall: 1) consult with the Navy throughout any AOC dispute resolution process relating to a Notice of Intent to Find Default against the AOC respondents for all or a portion of a particular parcel or site, 2) provide the Navy with notice and the opportunity to participate in all meetings between the regulators and the AOC respondents in the dispute resolution process, 3) provide the Navy with copies of all documentation and correspondence relating to the AOC dispute resolution process, and 4) provide the Navy with notice and timely opportunities to submit written comments to the parties in the course of the AOC dispute resolution process. The Navy's FFA obligations relating to the particular parcel or site shall remain suspended until the AOC dispute resolution procedure is completed and a Finding of Default has been issued under the AOC. The Navy's suspended FFA obligations shall resume upon the Navy's receipt of a Finding of Default.

Commented [rc11]: Note to EPA/DTSC: See edit

Commented [RLE12]: Do we need exception language here for work that would require a more timely response?

- 6.5.6. In the event of a final Finding of Default, the Navy shall complete

CERCLA response actions on the Early Transfer Property for the particular parcel or site subject to the Finding of Default and perform associated Long Term Obligations for all response action decisions selected before Navy resumption of the work. Notwithstanding the above, the Navy may, within 30 working days of the issuance of a Finding of Default propose to EPA, DTSC, and the RWQCB modifications to the relevant Parcel B and G Remedial Action (RA) Work Plan(s) prepared by the AOC respondents. To the extent that EPA, DTSC, and RWQCB and the Navy do not agree with respect to such a Navy proposal, any Party may initiate Dispute Resolution pursuant to Section 12 of the Amended FFA.

Commented [rc13]: Note to EPA/DTSC: See minor edit

6.5.67. Within 30 working days after 1) the issuance of a final Finding of Default or 2) final resolution of a Navy proposal to modify relevant Parcel B and G RA Work Plans as described in subsection 6.5.5 above, whichever comes later, the Navy will provide EPA, DTSC, and the RWQCB with its schedule for the implementation of all response actions remaining to be performed on the Early Transfer Property. If the Parties fail to agree within 45 working days from receipt of the proposed schedule for implementation, the matter shall immediately be submitted for dispute resolution pursuant to Section 12 of the Amended FFA.

6.5.78 Notices/Management Group Meetings

Notice of activities under this FFA Amendment shall be provided to the following addresses:

(1) For the Navy

Keith Forman
Hunters Point Shipyard BRAC Environmental Coordinator
BRAC Program Management Office West
1455 Frazee Road, Suite 900
San Diego, CA 92108-4310
Tel (619)-532-0913
Fax: (619) 532-xxxx

(2) For EPA:

Assistant Director
Federal Facilities and Site Clean-up Branch
U.S. Environmental Protection Agency

Region 9
75 Hawthorne Street
San Francisco, CA 94105
Tel (415) 972 [redacted] Fax (415) 947 3520

Commented [rc14]: Note to EPA: Could you please provide the correct phone number?

EPA Project Coordinator
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105
Tel (415) 972 [redacted] Fax (415) 947 3520

Commented [rc15]: Note to EPA: Could you please provide the correct phone number?

(3) For DTSC:

~~Anthony J. Landis, P.E.~~
~~Chief, Northern California Operations~~
Office of Military Facilities
Department of Toxic Substance
8800 Cal Center Drive
Sacramento, CA 98526-3200
Tel (916) 255 3732
Fax (916) 255 3734

Commented [rc16]: Note to DTSC: Could you please provide the correct name and title?

Project Coordinator
DTSC
~~8800 Cal Center Drive~~
~~Sacramento, CA 95746~~
~~Berkeley, Ca~~
Tel ~~(916) 255 6403~~
Fax ~~(916) 255 3734~~

Commented [rc17]: Note to DTSC: Could you please provide the correct address!

(4) For RWQCB:

Project Coordinator

6.5.9. Nothing in this Section shall be construed to interfere with or alter the internal organization or procedures of a Party, including, without limitation, signature authority.

IV. Section 7 (CONSULTATION: REVIEW AND COMMENT PROCESS FOR DRAFT AND FINAL DOCUMENTS) is suspended in regards to the Navy's consultation responsibilities for the Early Transfer Property except for the following subsections:

7.11 Under the process and schedule contained in the AOC, the AOC respondents will submit for review, comment, and approval by EPA, DTSC and RWQCB all documents, deliverables, reports, and other information necessary to implement response actions on the Early Transfer Property and achieve Completion of Remedial Action. Copies of these documents, deliverables, reports and other necessary information will be provided to the Navy pursuant to the ETCA and AOC.

Commented [rc18]: Note to EPA/DTSC: The Navy is defining what documents it wants copies of and for what purpose in the draft TSRS. We anticipate that corresponding changes will ultimately be made in the ETCA and AOC once the parties agree on what documents will be provided and for what purposes

7.12 EPA, DTSC, and RWQCB will provide copies of their comments on CERCLA primary and secondary documents to the Navy at the same time that they provide the comments to the AOC respondents.

V. Section 11 (EMERGENCIES AND REMOVALS) is amended to add the following subsection with respect to the Early Transfer Property:

11.7 SFRA and HPS Development Co., LP, under the terms of the ETCA and AOC, shall be responsible for providing notice on their discovery or awareness of a release of a hazardous substance or an emergency situation. Nonetheless, to the extent that Navy personnel and/or its contractors become aware of an emergency or other situation that may present an immediate endangerment to public health, welfare or the environment at or near the Early Transfer Property, the Navy shall notify EPA, RWQCB and DTSC in accordance with Section 11.1 of the 1992 FFA. Upon the Navy's discovery, or after receipt of notice from SFRA, HPS Development Co., LP, EPA or DTSC of such information, the Navy shall use its best efforts to contact and confer with SFRA and ensure that either the Navy or SFRA will conduct any necessary emergency response action required on the Early Transfer Property in a timely manner. For those situations that involve and/or pertain to a Navy Retained Condition, the Navy will take on all responsibilities outlined in Sections 11.1 to 11.6 of the 1992 FFA upon the Navy's discovery, or after receipt of notice from SFRA, HPS Development Co., LP, EPA or DTSC, whichever occurs first. If the Navy and SFRA cannot agree in a timely manner as to who is responsible for responding to an emergency situation, the Navy shall undertake appropriate emergency response action as provided in Section 11 of the FFA.

Commented [RLE19]: If an immediate response is necessary, how would we define a "timely manner"?

Commented [rc20]: Note to EPA/DTSC: The additional language that the Navy added to this section were intended to address EPA and DTSC concerns about clarifying Navy responsibility for emergency response actions

VI. Section 12 (DISPUTE RESOLUTION) is amended to add the following subsections:

12.14 The Parties agree that while the AOC is in effect, the AOC dispute

resolution process is the exclusive dispute process between the AOC respondents and EPA, DTSC, and RWQCB related to all responsibilities that the AOC respondents have agreed to assume for the Navy under the AOC including the determination that certain work is a NRC. The Navy agrees that a resolution of a dispute between the AOC respondents and EPA, DTSC, and the RWQCB under the AOC may not be disputed by the Navy, EPA, DTSC, or the RWQCB under Section 12 of the 1992 FFA.

Nothing herein shall be construed to affect or impair the Navy's rights to pursue dispute resolution pursuant to Section 1001 of the ETCA and 32 CFR Section 22.815 concerning whether certain work or environmental conditions are within the scope of the SFRA's obligations under the ETCA.

Commented [RLE21]: See comment for section 6 5 2 above

Commented [rc22]: Note to EPA/DTSC: The addition of this sentence will adequately address the Navy's concern about overlapping dispute resolution procedures in the ETCA, AOC, and FFA Amendments because it reserves the Navy's rights to pursue dispute resolution under the ETCA regarding the contractual scope of the work to be performed under the ETCA

12.15 Section 12 of the 1992 FFA remains in effect relative to violations of the 1992 FFA and this Amendment relating to Navy Retained Conditions.

12.16 In the event of a default under the AOC, EPA will provide a notice to the Navy by sending a copy of the Notice of Intent to Default provided for in the AOC. The Navy may submit comments on the Notice within 45 calendar days of its receipt for EPA to consider during discussions and/or a dispute with SFRA.

Commented [rc23]: Note to EPA/DTSC: We don't understand why EPA proposed to delete this section based upon their comment that "This may not be the proper time period". Was this intended to suggest that 45 days is not the correct time period? It appears that retaining this paragraph is still appropriate. Please clarify the comment

VII. Section 31 (COVENANT NOT TO SUE AND RESERVATION OF RIGHTS) is amended to add the following subsection related exclusively to the Early Transfer Property:

31.3. In consideration of the Navy's compliance with this Amendment and the 1992 FFA, and based on the information known to the Parties or reasonably available on the effective date of this Amendment, EPA, the Navy, DTSC, and RWQCB agree that compliance with this Amendment and the 1992 FFA shall stand in lieu of any administrative, legal, and equitable remedies against the Navy available to them regarding the releases or threatened releases of hazardous substances including hazardous wastes, pollutants or contaminants at the Early Transfer Property which are the subject of the AOC or ETCA.

VIII. Section 36 (EFFECTIVE DATE AND PUBLIC COMMENT) is amended to add the following subsection applicable on to the Early Transfer Property:

36.4 The FFA Amendment becomes effective after all Parties have signed this Amendment, and upon approval of the Covenant Deferral Request by EPA, with the concurrence of the State. When these conditions are met, EPA shall promptly notify all Parties in writing of the effective date.

IX. Section 39 (INSTITUTIONAL CONTROLS) shall be added to the 1992 FFA.

39.1. As a condition to deferring the CERCLA Covenant, land, water, and resource use restrictions required by the Parcels B and G RODs will be addressed as provided in those RODs, the Parcels B and G LUC RDs, and the FOSET. The Navy and DTSC will establish the land, water, and resource use restrictions on the Early Transfer Property, by entering into a Covenant to Restrict the Use of Property ("CRUP"), prior to the conveyance of the Early Transfer Property. The restrictions contained in the CRUP also will be included in the federal quitclaim deed(s) transferring the Early Transfer Property to SFRA.

39.2. These restrictions in the CRUP and the federal deed(s) will be placed over the property as a condition of deferring the CERCLA covenant in order to ensure the protection of human health and the environment prior to completing all remedial actions. They shall also serve as key components of the remedial action required by the RODs for Parcels B and G. The Navy shall report any activities prohibited by the CRUP and federal deed known by it or reported to it and take appropriate action as provided in the Parcels B and G LUC RDs.

X. Section 40 shall be added to the 1992 FFA:

40. SELECTION OF RESPONSE ACTIONS

40.1 Notwithstanding that the AOC respondents have assumed certain Navy responsibilities under the ETCA, consistent with Sections 7, 8, 9, and 12 above, the Navy and EPA shall be responsible for selecting any necessary CERCLA response actions required in addition to those required by the RODs for Parcels B and G.

XI. Section 41 shall be added to the 1992 FFA:

41. EFFECT OF AMENDMENT NO.1 TO THE 1992 FFA

41.1 Nothing in this Amendment to the 1992 FFA shall modify any term or condition of the 1992 FFA unless expressly set forth herein. Nothing in this Amendment creates any third party rights.

41.2 Nothing in this Amendment to the 1992 FFA shall require EPA or the State to perform response actions at the Early Transfer Property.

41.3 Nothing in this Amendment to the 1992 FFA shall affect whatever ability the Navy has to contract or agree with third parties to conduct response actions for

Navy Obligations.

41.4 Nothing in this Amendment to the 1992 FFA will be precedent for agreements concerning any other Superfund Site.

XII. Section 42 shall be added to the 1992 FFA:

42. NAVY NOTICE AND RESPONSIBILITIES IN EVENT OF MATERIAL BREACH BY SFRA OR HPS DEVELOPMENT CO., LP, OR ESCA DISPUTE.

42.1 The Navy shall notify EPA in writing within 15 calendar days, with a copy to DTSC and RWQCB, upon learning of any information that may constitute a material breach by SFRA OR HPS Development Co., LP, under the ETCA, or within 15 calendar days of a dispute arising under the ETCA.

AUTHORIZED SIGNATURES

Each of the undersigned representatives of the Parties certifies that he or she is fully authorized by the entity he or she represents to enter into the terms of this First Amendment to the 1992 FFA and to legally bind such entity to this First Amendment to the 1992 FFA.

IT IS SO AGREED:

by

UNITED STATES DEPARTMENT OF NAVY

Deputy Assistant Secretary of the Navy (Environment)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Deputy Regional Administrator
U.S. Environmental Protection Agency Region IX

CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Office of Military Facilities
California Department of Toxic Substances Control

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

Executive Officer
California Regional Water Quality Control Board